



Kamau t/a Unitex Commercial Agencies v Kariuki & 2 others (Environment & Land Petition E009 of 2024) [2025] KEELC 226 (KLR) (30 January 2025) (Ruling)

Neutral citation: [2025] KEELC 226 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND PETITION E009 OF 2024
MAO ODENY, J
JANUARY 30, 2025**

BETWEEN

**JOSEPH WAINAINA KAMAU T/A UNITEX COMMERCIAL
AGENCIES PETITIONER**

AND

**SAMUEL MAINA KARIUKI 1ST RESPONDENT
THE DISTRICT LAND REGISTRAR 2ND RESPONDENT
THE HONOURABLE ATTORNEY GENERAL 3RD RESPONDENT**

RULING

1. This ruling is in respect of the Notice of Preliminary Objection dated October 24, 2024 filed by the 1st Respondent on the following grounds:
 1. The Petition in Res Judicata; the issue of land, to wit, Nakuru Municipality Block 22/1719 (Muguga) has been heard and determined in suits, to wit, Nakuru HCCC No. 130 of 2010 and Nakuru CACA No. 33 of 2015. (sic)
 2. The Petitioner has no locus standi and lacks capacity to institute the Petition herein for the reasons:
 - a. The Petitioner and 1st Respondent do not have any agreement or any dealings over the land, to wit, Nakuru Municipality Block 22/1719 (Muguga).
 - b. The land, to wit, Nakuru Municipality Block 22/1719 (Muguga) has never been owned by the Petitioner and the Petitioner has never had any interest or right over the suit land registered in his favour thus Article 40 of *the constitution* does not afford to the Petitioner.



3. The Petitioner is guilty of non-disclosure of material facts particularly matters disclosed in grounds 1 and 2 herein.
 4. The facts giving rise to this Petition do not qualify to be articulated or ligated upon in a Petition, the matters in issue are best dealt with in a normal Environment and Land Court as the matters in issue relate to land; thus this Honourable court lacks jurisdiction to hear matters concerning land as a petition.
 5. This Honourable Court is “Functus Officio” with regard to the suit property.
 6. The Petitioner does not pray for any orders in his favour.
2. The Petitioner Joseph Wainaina Kamau T/A Unitex Commercial Agencies filed a Replying Affidavit sworn on 13th December, 2024 and deponed that the Preliminary objection is fatally defective and must be dismissed with costs.

1st Respondent’s Submissions

3. Mr. Mbiyu, counsel for the 1st Respondent filed submissions dated 14th November, 2024 and submitted that the Preliminary Objection dated 24th October, 2024 is merited and relied on the case of Julieta Marigu Njagi vs Virginia Njoki Mwangi & Anor (2022) eKLR.
4. On the issue of res-judicata, counsel submitted that the issue of parcel of land known as Nakuru Municipality Block 22/1719 (Muguga) was litigated with finality in Nakuru HCC No 130 of 2010 and Nakuru CACA No 33 of 2015 and relied on the cases of Richard Wewafwa Songoi vs Ben Munyifwa Songoi Kisumu CACA No 110 of 2016, William Koross (Legal Personal Representative of Elisha C.A Koross) vs Hezekaih Kiptoo Komen & 4 others (2015) eKLR.
5. Counsel submitted that Petitioner has admitted in his petition of being aware of suit and the Appeal in the Court of Appeal. Counsel further attached the two Judgments of the High Court and Court of Appeal in respect of the suit land for ease of reference. Mr. Mbiyu also submitted that the Supreme Court in the case of John Florence Maritime Services Ltd & another vs Cabinet Secretary Transport and Infrastructure & 3 others (2021) eKLR reiterated that the doctrine of res judicata can be raised in Petitions. Counsel therefore submitted that the Petitioner has not demonstrated any special circumstances to warrant the court to make an exception.
6. On the issue of locus-standi, Mr. Mbiyu submitted that the Petitioner has no sufficiency of interest in the suit land as he has never owned the land hence Article 40 of *the Constitution* cannot apply. Further that there is nowhere in the petition that the Petitioner claims to own the suit parcel of land as the issue had already been litigated and resolved. Counsel relied on the case of CFC Stanbic Bank Ltd vs Attorney General & Another [2013] eKLR, where the court held that where there is no longer a dispute or controversy between the parties, there is no longer a justiciable issue for the court to determine
7. On the issue of the court being functus officio, counsel submitted that the Petitioner wants to re-litigate as to who is the owner of the suit land and relied on the cases of Raila Odinga & 2 others vs Independent Electoral & Boundaries Commission & 3 others [2013] eKLR and Telkom Kenya Ltd vs John Ochanda (Suing on his own behalf and on behalf of 996 Former Employees of Telkom Kenya Limited) 2014 and urged the court to uphold the preliminary objection and strike out the Petition with costs.



Petitioner's Submissions

8. The Petitioner filed submissions dated 7th January, 2025 and identified the following issues for determination:
 - a. Whether the Preliminary Objection dated 24th November, 2024 is merited?
 - b. Whether the Petitioner has no locus standi and lacks capacity to institute the petition?
 - c. Whether the Honourable Court is functus officio with regards to the suit property?
9. On the first issue, the Petitioner submitted that the 1st Respondent has failed to establish the elements of res-judicata as the current suit was not directly and substantially in issue in the former suit, the issue in question between the parties has never been litigated either by the petitioner or the 1st Respondent in respect of the suit parcel.
10. The Petitioner submitted that the issue of res-judicata cannot be raised as a preliminary objection as it should be pure points of law which is argued on the assumption that all facts pleaded by the other side are correct.
11. The Petitioner relied on the cases of Mukisa Biscuits Manufacturing Co. as Ltd vs West End Distributors Ltd (1969) EA 696, Independent Electoral & Boundaries Commission vs Maina Kiai & 5 others [2017] eKLR, Oraro vs Mbaja (2005) 1KLR 141 and George Kamau & 4 others vs County Government of Trans Nzoia & another (2014) eKLR.
12. On the second issue, the Petitioner submitted that the court would have to interrogate the evidence produced to determine if the Petitioner has proprietary interest over the suit property hence the matter cannot be determined by way of a preliminary objection. The Petitioner relied on the cases of Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others (2014) eKLR, Law Society of Kenya vs Commissioner of Lands & Others, Nakuru High Court Civil Case No 464 of 2020, Alfred Njau and others vs City Council of Nairobi (1982) KAR 229, Quick Enterprises Ltd vs Kenya Railways Corporation, Kisumu High Court Civil Case No 22 of 1999 and Presbyterian Foundation & another vs East Africa Partnership Ltd & another [2012] eKLR.
13. On the third issue, the Petitioner submitted that the court is not functus officio. And cited Section 99 of the *Civil Procedure Act* and Order 21 Rule 3 (3) of the Civil Procedure Rules and the case of Jersey Evening Post Limited vs A. Thani [2002] JLR 542 and urged the court to dismiss the preliminary objection with costs.

Analysis And Determination

14. The issues for determination are as to whether this suit is res judicata, whether the Petitioner has locus standi to bring this petition and whether the Preliminary objection has merit.
15. The doctrine of preliminary objection was described in the case of Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors [1969] EA 696 as

“...a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts



pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

16. A preliminary objection raises a pure point of law which if argued has the effect of disposing the case at preliminary stage. It is based on the assumption that the all facts pleaded are correct and not disputed. A preliminary objection cannot be raised if any facts have to be ascertained through additional evidence.
17. On the issue as to whether this Petition is res judicata and this being a constitutional Petition, the court should first answer the question whether a preliminary objection can be raised in a constitutional Petition on the doctrine of res judicata.
18. In the Supreme Court case of John Florence Maritime Services Ltd & another vs Cabinet Secretary Transport and Infrastructure & 3 others (2021) eKLR the court held as follows:

“The doctrine of res judicata was based on the principle of finality which was a matter of public policy. The principle of finality was one of the pillars upon which the judicial system was founded and the doctrine of res judicata prevented a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensured that litigation came to an end, and the verdict duly translated into fruit for one party, and liability for another party, conclusively.

If the Supreme Court were to find that the doctrine did not apply to constitutional litigation, the doctrine could lose much of its legitimacy and validity. Constitutional tenets permeated all litigation starting with the application of article 159 of *the Constitution* in both civil and criminal litigation, and its application embedded in all procedural statutes. Further article 50 of *the Constitution* on right to fair hearing and article 48 of *the Constitution* on access to justice were fundamental rights to which every litigant was entitled to. Such a holding could lead to parties, that whenever they needed to circumscribe the doctrine of res judicata, they only needed to invoke some constitutional provision or other.

Though the doctrine of res judicata lent itself to promote the orderly administration of justice, it was not to be at the cost of real injustice. Rights kept on evolving, mutating, and assuming multifaceted dimensions it could be difficult to specify what was rarest and clearest.

In granting exemptions to the applicability of res judicata, courts would consider whether there was potential for substantial injustice if a court did not hear a constitutional matter or issue on its merits. Before a court could arrive at such a conclusion, it had to examine the entirety of the circumstances as well as address the factors for and against the exercise of such discretionary power. In the alternative, a litigant had to demonstrate special circumstances warranting the court to make an exception.

19. The court in granting exceptions on the applicability of the doctrine of res judicata in constitutional Petitions it must take into consideration whether it would lead to injustice if the matter were not heard on merit in its entirety in exercising such discretion. The court should also guard against diluting the doctrine of res judicata, which is based on the principle that litigation must end with finality and to avoid cases mutating in court.
20. The Petitioner in his Petition has elaborately alluded to the cases in the High Court and the Court of Appeal namely Nakuru HCCC No. 130 of 2010 and NAKURU CACA No. 33 of 2015 which he admitted that it was in respect of the same subject matter being Nakuru Municipality Block 22/1719 (Muguga) which was heard and determined. The Petitioner is aware of the two cases, which are part



of his averments in the Petition. It therefore follows that he admits that the issue of land parcel No. Nakuru Municipality Block 22/1719 (Muguga) was heard and determined in the High Court and the Court of Appeal. The court will not go to the merits and demerits of the case and that the Petitioner wants to disguise himself to revive a case whose issues have already been determined.

21. If this court were to hear this case, would it be overturning the Judgment of the Court of Appeal which would be against the doctrine of stare decisis. This court would not wish to go that route. The doctrine of stare decisis is a fundamental legal principle which is crucial for consistency and predictability in the judicial process which must be adhered to unless such precedent has been overturned by a court superior to the court handling the matter. Until such time, the precedent binds the court.
22. The Respondent also attached the High Court and the Court of Appeal decisions in respect of the suit land, which had been determined for ease of reference by the court. It was also not disputed by the Petitioner that those judgments existed.
23. In the case of Tee Gee Electrics and Plastics Company Ltd vs. Kenya Industrial Estates Limited [2005] KLR 97 the Court stated:

“Both the policy rationale as well as our case law lean in the direction that a suit will only be deemed to be barred by res judicata when it was heard and determined on the substantive merits of the case as opposed to suits that are dismissed on preliminary technical points. Res Judicata bars a future suit only when the case is resolved based on the facts and evidence of the case or when the final judgment concerned the actual facts giving rise to the claim. For example, dismissal of a case for lack of subject matter or because the service was improper or even for want of prosecution does not give rise to judgments on the merits and therefore do not trigger the plea of res judicata. The last issue (dismissal for want of prosecution) was the issue in The Tee Gee Electrics and Plastics Company Ltd v Kenya Industrial Estates Ltd [2005] KLR 97; LLR CAK 6880. Here the Court of Appeal was explicit that res judicata does not apply if the earlier suit was dismissed for want of prosecution as the same was not heard on merits”.
24. In this case, the suit was heard and determined and an Appeal filed in the Court of Appeal which also rendered its judgment which has been attached. The Respondent filed a Notice of Preliminary Objection detailing the issues why the Petition is res judicata of which the Petitioner also filed a Replying affidavit opposing the motion detailing grounds why he thinks that the petition is not res judicata.
25. Section 7 of the *Civil Procedure Act* provides for the doctrine of res judicata which bars the court from trying any suit or issue which had been finally determined by a court of competent jurisdiction in a former suit involving the same parties or parties litigating under the same title. Res judicata applies if the following are proved:
 - a. The suit or issue raised was directly and substantially in issue in the former suit
 - b. The former suit was between the same party or parties under whom they or any of them claim
 - c. That those parties were litigating under the same title.
 - d. That the issue in question was heard and finally determined in the former suit.
 - e. That the court, which heard and determined the issue was competent to try both the suit and the issue was raised and subsequent suit.



26. Similarly, the test of determining whether a matter is res judicata are as was held in the case of Bernard Mugo Ndegwa vs James Nderitu Githae and 2 Others (2010) eKLR, as follows:
- a. The matter in issue is identical in both suits;
 - b. The parties in the suit are the same;
 - c. Sameness of the title/claim;
 - d. Concurrence of jurisdiction; and
 - e. Finality of the previous decision.
27. The Preliminary Objection filed by the respondent was on a point of law on res judicata and locus standi which touches on the jurisdiction of the court to hear and determine a matter. I will not deal with the issue of locus standi as the Petitioner had no business filing this suit in the first place as it had already been determined with finality by a competent court of concurrent jurisdiction.
28. In the case of Diocese of Eldoret Trustees (Registered) vs Attorney General (on behalf of the PS Treasury) & Another [2020] eKLR this court stated thus:
- “ Courts must always be vigilant to guard against litigants who metamorphose to bring suits as new litigants or add others to circumvent the doctrine of res judicata. Adding or subtracting litigants in a suit that is substantially or directly related to a previous suit with the same subject matter does not sanitize the suit to make it a fresh suit. It actually worsens the situation by making the suit terminate prematurely vide a preliminary objection. I find that this suit is res judicata and an abuse of the court process. The preliminary objection has merit and hence upheld. Plaintiff’s case is dismissed with costs.
29. I am still of a similar view that litigants should not be allowed to abuse court processes to circumvent the doctrine of res judicata. I find this Petition is res judicata and is therefore struck out with costs to the 1st Respondent. The Preliminary objection is upheld.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 30TH DAY OF JANUARY 2025.

M. A. ODENY

JUDGE

